In the Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 14

FIBREBOARD PAPER PRODUCTS CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Fibreboard Paper Products Corporation prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the District of Columbia Circuit, entered on July 3, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported except at 47 CCH Labor Cases, par. 18,339; the opinion, along with the Court's judgment and decree, is reproduced in Appendix A hereto. The original Decision and Order of the National Labor Relations Board is reported at 130 NLRB 1558 and the Board's Supplemental Decision

and Order is reported at 138 NLRB 550. Both of the Board's decisions are reproduced in the record printed for the use of the Court below (Joint Appendix), nine copies of which are filed herewith.

JURISDICTION

The judgment of the Court below was entered on July 3, 1963. On July 26, 1963, within the time allowed by order, a petition for rehearing was filed. On September 27, 1963, the petition for rehearing was denied. On October 10, 1963, the decree of enforcement was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1). The jurisdiction of the Court below and of the National Labor Relations Board rested on 29 U.S.C. Sec. 160.

QUESTIONS PRESENTED

1. Was Petitioner required by the National Labor Relations Act to bargain with a union representing some of its employees about whether to let to an independent contractor for legitimate business reasons the performance of certain operations in which those employees had been engaged?

2. Did the Court below exceed its office as a court of review in attempting to remedy the failure of the National Labor Relations Board to state its findings and reasons or basis therefor by imposing a standard of conduct differing from that which the Board had prescribed and by supplying findings which the Board had not made?

3. Was the Board, in a case involving only a refusal to bargain, empowered to order the resumption of operations which had been discontinued for legitimate business reasons and reinstatement with back pay of the individuals formerly employed therein?

4. Did the Board act erroneously or in excess of its powers (a) in denying Petitioner's request to reopen the record for evidence of events occurring since the hearing before the Trial Examiner bearing upon the question of what, if any, remedial order should issue, or (b) in modifying its original Decision and Order of Dismissal a year and one-half after issuance thereof without any excuse for the delay other than the fact that the four members of the Board who were qualified to participate in the case were equally divided?

STATUTES INVOLVED

Statutes involved in the case are Sections 8(a), 8(d), 10(e) and 10(d) of the National Labor Relations Act (29 U.S. Code Secs. 158(a), 158(d), 160(e), 160(d)), and Sections 5, 6(a), 8(b) and 10(e) of the Administrative Procedure Act (5 U.S. Code Secs. 1004, 1005(a), 1007(b), 1009(e)). Their text is set forth in Appendix B.

STATEMENT

Petitioner has a manufacturing plant at Emeryville, California.

Until August of 1959, Petitioner did its own maintenance work about the plant. Some of its maintenance employees were represented for purposes of collective bargaining by a local of the United Steelworkers of America (hereinafter called the Union, with which Petitioner had a contract (J.A. 46). The contract terminated on July 31, 1959 (J.A. 46, 61).

Petitioner had been concerned about the high cost of its maintenance work and had been studying the possibility of effecting savings by having the work done by a contractor specializing in plant maintenance (J.A. 57-58). In

early August, after notifying the Union of its intention, outlining a plan of severance pay for employees to be terminated and discussing the matter at some length with the Union's business agents and, later, its negotiating committee (J.A. 49-54), Petitioner entered into a contract with Fluor Maintenance Company for performance of the maintenance work by Fluor (J.A. 58). Its sole purpose in doing so was to effect savings in its maintenance costs (J.A. 57-60).

Thereafter, Petitioner was charged by the Union with certain unfair labor practices, including a refusal to bargain, and proceedings were had before the National Labor Relations Board.

The Board's Original Decision.

In his Intermediate Report, the Trial Examiner set forth the facts stated above, including an account of the correspondence and discussions between Petitioner and the Union (J.A. 49-54), and found that "the allegations of the complaint, as amended, that [Petitioner] had engaged in certain acts and conduct violative of Section 8(a)(1), (3) and (5) of the Act are not supported by substantial evidence" (J.A. 61). He recommended dismissal (ibid.).

The Board, in a decision issued March 29, 1961, adopted "the findings, conclusions and recommendations of the Trial Examiner" (J.A. 35). The Board specifically agreed with the Trial Examiner that Petitioner's "motive in contracting out its maintenance work was economic rather than discriminatory", that its maintenance employees "were validly terminated," and that it had satisfied its obligation to bargain about termination pay (J.A. 36).

The Board then noted a contention by General Counsel "that the Trial Examiner did not pass upon an issue of primary importance in this case," namely, whether Petitioner "was under a statutory duty to bargain about its *decision* to contract out the maintenance work" (J.A. 36), and the Board went on to discuss this question.

It was long-settled Board doctrine (see pp. 9-10, *infra*) that although an employer must bargain about measures such as termination pay (wages) or the provision of other work (tenure of employment), designed to ease the impact upon employees of a legitimate business decision to contract out work or to close or move a plant, he is under no duty to bargain about the decision itself. In conformity with that doctrine, the Board, with one dissent, held that the statutory language is not "so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort" (J.A. 38).

It dismissed the complaint (J.A. 39).

The Board's Supplemental Decision and Order.

Shortly after the decision there were certain changes in the membership of the Board, and both the Union and General Counsel moved for reconsideration. The Board did not act upon the motions until September 14, 1962, nearly a year and a half later, when a three-member Panel, one member dissenting, rendered the Supplemental Decision and Order here under review.

In the meantime, Petitioner had entirely discontinued the manufacture of certain products theretofore produced at Emeryville and had moved certain other manufacturing operations from Emeryville to a new and modern plant at

Martinez, California. As a result, the number of maintenance workers required at Emeryville had been reduced by more than half. Petitioner had filed a request that in the event that the Board should decide to reconsider, the record be reopened for the reception of evidence as to the foregoing facts for the reason that they would be "pertinent to the question of the relief to be granted and particularly to the issues of reinstatement and back pay" (J.A. 168-169). No action had been taken on this request.

In the Supplemental Decision and Order, the Panel simultaneously granted the Union's motion for reconsideration (J.A. 19), denied Petitioner's request to reopen the record (ibid.), and modified the original decision by holding that Petitioner had been under a duty to bargain about its decision to contract out its maintenance work (J.A. 20). It ordered Petitioner to resume performance of the maintenance operations and to reinstate the individuals formerly employed therein with back pay from the date of the order (J.A. 27).

The Panel did not disturb the Board's original holding that Petitioner had not violated Section 8(a)(1) or 8(a)(3) of the Act and had satisfied its obligation to bargain about termination pay. The sole ground of the order was that Petitioner had been under a duty to bargain about whether to contract out the work.

Regarding the nature and extent of the bargaining duty thus imposed, the Panel, quoting with approval a dictum in the then recently decided case of *Town and Country Manufacturing Company, Inc.*, 136 NLRB 1022, said (J.A. 20-21):

> "Experience has shown . . . that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to

> both sides. Business operations may profitably continue and jobs may be preserved. *Such prior discussion with a duly designated bargaining representative is all that the Act contemplates.* But it commands no less." (Emphasis supplied.)

Arguably, Petitioner had engaged in the prior discussion which "is all that the Act contemplates"; it had advised the Union of its intention to contract out the work (J.A. 49-50), had explained that its reason for doing so was to effect savings in maintenance costs (J.A. 53-54), had repeatedly offered to discuss any questions that the Union might have (J.A. 50, 53, 108), and had offered to entertain a proposal, which the Union did not see fit to make, that contracting be deferred to permit of further discussion (J.A. 54, 86). However, the question whether these discussions satisfied the Panel's concept of bargaining was one which was never explored. In its original decision, the Board confined itself to the question whether there was a duty to bargain and, holding that there was not, never reached or considered the question whether the discussions which had occurred satisfied the bargaining requirement which the Panel's decision later imposed. Nor did the Panel consider the question; it simply assumed, contrary to the fact, that the Board had previously found that Petitioner acted "without first negotiating with the duly designated bargaining agent over its decision to do so" (J.A. 19).[1]

The Decision of the Court of Appeals.

Petitioner petitioned for review of the decision, and the Board cross-petitioned for enforcement. The Court below

1. Thus the Panel began its discussion of the question whether there was a duty to bargain with a characterization of the Board's original decision as having held what is quoted in the text (J.A. 19). Throughout the decision failure to negotiate was simply assumed.

granted the Board's request for enforcement. Rehearing was denied.

Upon the question whether Petitioner had been under a duty to bargain about its decision to contract out the work, the Court, referring to the 1947 revision of the Act, correctly stated:

> "In framing section 8(d) of the Act, 29 U.S.C. § 158(d), Congress was incorporating the decisions of the Board and the Courts defining the duty to bargain collectively."

But the Court continued on without observing that those decisions had denied the existence of a duty to bargain about a decision to contract out work.[2] Nor did the Court mention any of the subsequent decisions of the Board and the courts, of which there have been a number, dealing with the question (see p. 10, *infra*).

The Court disposed of Petitioner's objection to the lack of findings with this simple statement:

> "The Board's opinions indicate that a finding of refusal to bargain was made by the Board."

Proceeding then to impose a standard of conduct differing from that prescribed by the Board and supplying findings

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2. There had been two decisions prior to 1947: *Brown-McLaren Manufacturing Company*, 34 NLRB 984 (1941), and *Mahoning Mining Company*, 61 NLRB 792 (1945). In the case last cited, the Board, in reversing a trial examiner's finding of a refusal to bargain, had declared:

> "Since changing conditions in industry necessitate revision of bargaining units which will best effectuate the policies of the Act, the Board has never held that once it has established an appropriate unit for bargaining purposes, an employer may not in good faith, without regard to union organization of employees, change his business structure, sell or contract out a portion of his operations, or make any like change which might affect the constituency of the appropriate unit without first consulting the bargaining representative of the employees affected by the proposed business change." (61 NLRB at 803.)

which the Board had not made, the Court held that Petitioner had failed to "bargain to impasse before taking unilateral action" and had not afforded the Union "an opportunity to meet management's legitimate complaints that its maintenance was unduly costly."

In addition to the points considered in the Court's opinion, Petitioner had urged that the Panel acted erroneously and in excess of the Board's powers (1) in ordering that Petitioner resume performance of the maintenance operations and reinstate, with back pay to the date of the order, the individuals formerly employed therein, (2) in denying Petitioner's request that in the event of reconsideration the record be opened for evidence of changes which had occurred in Petitioner's operations since the hearing before the Trial Examiner, and (3) in failing to act upon the motions for reconsideration with reasonable dispatch.[3]

The Court did not mention any of these points.

THE REASONS FOR GRANTING A WRIT

I. In Holding That Petitioner Was Under a Duty to Bargain Over Its Decision to Contract Out the Work, the Court Below Rendered a Decision Upon an Important Question of Federal Law Which Conflicts with Decisions of the Second, Seventh and Eighth Circuits and Which Has Not Been, but Should Be, Settled by This Court.

Until approximately a year after its original decision in the instant matter, it was settled Board doctrine that an employer is not required to bargain about a decision, motivated by legitimate business considerations, to con-

3. Petitioner also had urged that the Board had failed to give the notice required by Section 10(d) of the National Labor Relations Act (29 U.S.C. § 160(d)) and had failed to afford the opportunity for hearing which the provision for notice impliedly requires. See *Sims v. Greene*, 161 F.2d 87 (3d Cir. 1947). This is a point which Petitioner will wish to argue if certiorari is granted.

tract out work or close or move his plant. *Brown-McLaren Manufacturing Company*, 34 NLRB 984 (1941); *Mahoning Mining Company*, 61 NLRB 792, 803 (1945); *Walter Holm & Company*, 87 NLRB 1169, 1172 (1949); *Celanese Corporation of America*, 95 NLRB 664, 713 (1951); *Krantz Wire & Mfg. Co.*, 97 NLRB 971, 988 (1952). He was required to bargain about measures such as termination pay (wages) or the provision of other work (tenure of employment) designed to ease the impact of the decision upon his employees (see, e.g., *Walter Holm & Company, supra; National Gas Company*, 99 NLRB 273 (1952); *Brown Truck & Trailer Mfg. Co., Inc.*, 106 NLRB 999 (1953); *Bickford Shoes, Inc.*, 109 NLRB 1346 (1954); *California Footwear Co.*, 114 NLRB 765 (1955), enf. in part, 245 F.2d 886 (9th Cir. 1957)), but he was not required to bargain about the decision itself.

The foregoing doctrine had been approved by two courts of appeals (*NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *Jays Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961)), and has recently been approved by a third (*NLRB v. Adams Dairy, Inc.*, 48 CCH Labor Cases par. 18,469 (8th Cir. 1963)).[4]

4. Also illustrative of the general understanding that the Act imposed no duty to bargain about a business decision such as the one here involved are cases such as *NLRB v. Houston Chronicle Pub. Co.*, 211 F.2d 848 (5th Cir. 1954); *NLRB v. Atkins Transfer Co., Inc.*, 226 F.2d 324 (6th Cir. 1955); *NLRB v. Drennon Food Products Co.*, 272 F.2d 23 (5th Cir. 1959); *NLRB v. R. C. Mahon Co.*, 269 F.2d 44 (6th Cir. 1959); and *NLRB v. Lassing*, 284 F.2d 781 (6th Cir. 1960), cert. den., 366 U.S. 909, in which the legality of unilateral action in contracting out work or closing a plant was treated by both the Board and the courts as depending entirely upon the employer's motive. Neither the Board nor anyone else thought of contending that bargaining was required. See also cases such as *California Footwear Co.*, 114 NLRB 765 (1955), enf. in part, 246 F.2d 886 (9th Cir. 1957), in which the question was whether an employer who had moved his plant without consulting

And Congress had acquiesced therein through two general revisions of the Act, one in 1947 (61 Stat. 136) and the other in 1959 (73 Stat. 519), in which it had not seen fit to provide for a different rule.

Regarding the language of the Act, the court below said:

> "The statutory definition of those subjects about which the parties were required to bargain was of necessity framed in the broadest terms possible: wages, hours, terms and conditions of employment."

Patently, these are *not* the "broadest terms possible." Congress, if it had so desired, could have used language imposing by its terms a duty to bargain, not only about the subjects which it specified, but also about "the nature and extent of the employer's operations."

There is a significant difference between a question as to whether an employer shall carry on particular operations, and a question as to the wages, hours and conditions under which men are to be employed therein. It is the same difference as exists between a union demand that the employer bid upon or accept a particular commercial contract or order so as to insure continuous operation and a demand for supplemental unemployment benefits or for a guaranteed annual wage. The one does not deal with wages, hours or other terms or conditions of employment; the other does.

The line is one between measures dealing directly with wages, hours or conditions of employment and a business decision, which, while not dealing directly with any of those subjects, has consequential impact thereon. The decisions above cited recognized that the area in which an employer is required to bargain is not unlimited, and they fixed the limit at a point reasonably calculated to effectuate

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the Union had refused to bargain over transfer of employees to the new location, and in which there was no suggestion that he had been under a duty to bargain about his decision to move the plant.

the Congressional language and purpose. Indeed, the decisions could not have gone further without holding that there is no limit, for it is impossible to conceive of a business decision having no impact upon wages, hours or other terms or conditions of employment. (See dissent of Member Rodgers from the Board's Supplemental Decision, J.A. 31.)

It was not until the case of *Town and Country Manufacturing Company, Inc.*, 136 NLRB 1022 (1962), enf. 316 F.2d 846 (5th Cir. 1963), decided approximately a year after its original decision in the instant case, that the Board announced a contrary view. There the employer had contracted out work and terminated his employees *to avoid bargaining with a newly certified union;* he therefore was guilty of violating both Sections 8(a)(3) and 8(a)(5) of the Act, and this was the ground upon which the Board's order later was enforced. However, because of the impact of the contract upon the tenure of employment of the company's employees, the Board said by way of dictum that even if there had been no improper motivation, "we would nevertheless find that Respondent violated Section 8(a)(5) by failing to fulfill its mandatory obligation to consult with the union regarding its decision to subcontract" and that to the extent that the Board's original decision in the instant case held otherwise, "it is hereby overruled." 136 NLRB at 1027-1028.

The Board has since applied the rationale of its *Town and Country* dictum in holding that an employer, though his motives are beyond reproach, must bargain about a decision to substitute a different type-setting process for that theretofore employed (*Renton News Record*, 136 NLRB 1294 (1962)), about a decision to go out of business because of financial difficulties (*Lori-Ann of Miami*, 137 NLRB 1099

(1962)), and about a decision to sell a portion of his business (*Weingarten Food Center of Tenn., Inc.*, 140 NLRB No. 25, 1962 CCH NLRB Dec. par. 11,854 (1962)).

We are informed by the office of General Counsel that there are now pending before the Board at one stage or another 55 cases in which the complaints are based in whole or in part upon the above rationale: 29 involve contracting, 10 involve removal of operations to another location, 10 involve discontinuance of the business or a part thereof, and 6 involve sale of the business.

Importance of the Question.

The importance of the question whether an employer must bargain over a decision, prompted by legitimate business considerations, to contract out work is apparent. The problem arises daily.

But as illustrated by the Board's decisions last above cited, the rationale of an affirmative answer to that question extends far beyond the contracting out of work: it extends to every business decision having impact upon wages, hours or terms or conditions of employment. A decision to curtail or increase production, or to discontinue or change a particular product, or to substitute a new product, or to increase production of one product at the expense of another has such an impact. So does a decision to turn down an order or to refrain from bidding upon or accepting a particular job. In short, the decision of which review is sought means that the area in which an employer is required to bargain is without boundaries.

Conflict with Second, Seventh and Eighth Circuits.

The decision below was sandwiched between contrary decisions of the Seventh and Eighth Circuits and squarely

conflicts with those decisions as well as with an earlier decision of the Second Circuit.

The most recent of the decisions just mentioned was that of the Eighth Circuit in *NLRB v. Adams Dairy, Inc.*, 48 CCH Labor Cases, par. 18,469, decided September 12, 1963, approximately two months after the decision below. The Board had held the employer guilty of a refusal to bargain because of his action in contracting out the distribution of his products without consulting the union representing the employees theretofore engaged in that work. The Court, while holding that the employer was obligated to bargain "with reference to the treatment of the employees who were terminated by the decision" to contract out the work, held that he was not required to bargain about the decision itself. In the latter connection the Court cited with approval the Board's original decision in the instant case, referred to the decision of the Court below as "unpersuasive", and said:

> "We hold here that the decision on the part of Adams to terminate a phase of its business and distribute all of its products through independent contractors was not a required subject of collective bargaining."

In *Jays Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961), decided after issuance of the Board's original decision in the instant case, the Court referred to that decision with approval and held that an employer who had contracted out its truck maintenance work without consulting the union had been under no duty to bargain about its decision to do so. The Court said:

> "The Board's position in the case at bar is clearly inconsistent with its recent decision in National Labor Relations Board v. Fibreboard Paper Products Corp., 130 N.L.R.B. No. 161, 47 L.R.R.M. 1547, 1549, decided

on March 27, 1961. In that case, the Board held that an employer did not violate the Act, by failing to bargain with a union that represented maintenance employees, concerning the employer's decision to contract out maintenance work, since such decision is not concerned with conditions of employment but with questions of whether an employment relationship shall exist. The Board held that an employer has no statutory obligation to bargain with a union concerning basic management decisions, such as whether, and to what extent, to risk capital and managerial effort . . ." 292 F.2d at 320.

In *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961), where an employer had moved his operations to another city without consulting the union, the Court reversed the Board's finding of improper motivation and held that although the employer had violated Section 8(a)(5) by failing to bargain with the union over transfer of its employees to the new location, it had been under no duty to consult with the union regarding the move itself, saying in this connection:

". . . We are also of the opinion that, inasmuch as the move was made through a legitimate exercise of managerial discretion the issue of whether it was to be made need not have been submitted by respondents for discussion at the collective bargaining table under § 8(d) of the National Labor Relations Act, 29 U.S.C.A. § 158(d). However, we agree with the Board that the failure to give notice to the union of the move and failure to discuss the treatment to be accorded displaced employees was a violation of § 8(a)(5)." 293 F.2d at 172.

The Court later repeated:

"Was the failure to submit the move as a subject for bargaining a refusal to bargain with respect to rates of

pay, hours and conditions of employment? The decision to move was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion. However, once that decision was made § 8(a)(5) requires that notice of it be given to the union so that the negotiators could then consider the treatment due to those employees whose conditions of employment would be radically changed by the move." 293 F.2d at 176.

This Court's Decisions.

This Court has never passed upon the question whether the National Labor Relations Act imposes a duty to bargain about a business decision such as that involved in the instant case. The Court's nearest approach to the problem was in *Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330 (1960), wherein it held that the Norris-LaGuardia Act precluded issuance of an injunction against a strike to force amendment of a bargaining contract to provide:

> "No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization." 362 U.S. at 332.

The decision was based upon the ground that the case presented a "labor dispute" within the meaning of the Norris-LaGuardia Act, which is to be broadly construed, and that the Union's demand was not rendered unlawful by the Railway Labor Act or any other federal statute.

To hold that the Norris-LaGuardia Act deprives a federal court of jurisdiction to enjoin a strike is not to hold that the demand in support of which the strike was called is one over which the employer must bargain. *Lauf v. Shinner*, 303 U.S. 323 (1938). As said in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 205 (1962), the Norris-

LaGuardia Act is not limited to the protection of collective bargaining.

Nor does the fact that a demand is lawful mean that it is one over which bargaining is required. *NLRB v. Borg Warner Corp.*, 356 U.S. 342 (1958).

The only thing in the Court's opinion that could possibly be taken to mean that the Railway Labor Act required bargaining over the union's demand was a brief statement by way of dictum that "the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes concerning rates of pay, rules and working conditions." 362 U.S. at 339. We refer to the foregoing as a dictum because applicability of the Norris-LaGuardia Act does not depend upon the existence of a duty to bargain over the subject in controversy (see *Sinclair Refining Co. v. Atkinson, supra*), and the question whether there was such a duty was not presented.

If the *Telegraphers* case were nevertheless to be regarded as holding that the Railway Labor Act imposes a duty to bargain over a legitimate business decision to close or move a plant or contract out a part of the operations, the fact would remain that it most certainly did not hold that any such duty is imposed by the National Labor Relations Act: the opinion did not touch upon the latter Act.

II. The Court Below, in Imposing a Standard of Conduct Differing from That Which the Board Had Prescribed and in Supplying Findings Which the Board Had Not Made, Disregarded the Applicable Decisions of This Court as Well as Prior Decisions of Its Own; and in So Doing, It Imposed a Standard Which Was Erroneous.

The entire answer of the Court below to our complaint that the Board never explored the question whether Peti-

tioner refused to bargain about its decision to contract out the work and never made any finding of such a refusal is contained in the following statement in the Court's opinion:

> "The Board's opinions indicate that a finding of refusal to bargain was made by the Board."

The National Labor Relations Act requires that the Board "state its findings of fact" (29 U.S.C. § 160(c)), and the Administrative Procedure Act requires that the decision "include a statement of findings and conclusions, as well as the reasons or basis therefor" (5 U.S.C. § 1007(b)). A mere indication that a finding has been made does not satisfy the requirement of a finding; nor does it satisfy the requirement of a statement of the reasons or basis for the finding. *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962); *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 81 (1952); *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510-511 (1935).

While the Supplemental Decision indicates that the reconstituted Board labored under the misapprehension that somewhere along the line a refusal to bargain had been found, this was just what we have termed it—a misapprehension. The only findings ever made on *any* of the issues were those contained in the Intermediate Report and adopted by the Board in its original decision (see pp. 4-5, *supra*). All were favorable to Petitioner.

The Findings Supplied by the Court.

The Court was of the opinion that Petitioner did not "bargain to impasse before taking unilateral action" in that the Union was not "afforded an opportunity to meet management's legitimate complaints that its maintenance work was unduly costly." These are the premises upon which its decision rests.

But the Board had made no such findings. Nor had the Board mentioned any such requirements. ". . . prior discussion," the Board had said, "is all that the Act contemplates."

In imposing a standard of conduct differing from that prescribed by the Board and in supplying findings which the Board had not made, the Court below did exactly that which this Court has repeatedly held should not be done. *Burlington Truck Lines v. U. S.*, 371 U.S. 156, 168-169 (1962); *Kelley v. Everglades Dist.*, 319 U.S. 415, 421 (1943); *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88 (1942).

The Standard of Conduct Imposed by the Court.

The Court's holding that unilateral action taken prior to a bargaining impasse constitutes, per se, a refusal to bargain is at variance with decisions of this Court and of other courts of appeal and, if permitted to stand, will result in mischief.

In *NLRB. v. Katz*, 369 U.S. 736 (1962), this Court held that unilateral action taken during negotiations but without first consulting the union constitutes a refusal to bargain, but, in so holding, it recognized that "there is no resemblance between this situation and one wherein an employer, after notice and consultation, 'unilaterally' institutes a wage increase identical with one which the Union has rejected as too low" (369 U.S. at 745, n. 12). In the latter connection the Court referred to *NLRB v. Bradley Washfountain Co.*, 192 F.2d 144 (7th Cir. 1951) and *NLRB v. Landis Tool Co.*, 193 F.2d 279 (3d Cir. 1952), each of which held guiltless of a refusal to bargain an employer who had unilaterally placed in effect a wage increase after advising the union of its intention to do so, but while negotiations were still in progress and before an impasse had been reached.

What renders unilateral action objectionable is, not absence of an impasse, but, omission of prior notice and consultation. Thus it was that the Board, in *Town and Country Manufacturing Co., supra*, and in the instant case, said that "prior discussion . . . is all that the Act contemplates." And this is why the Board, in discussing the remedy to be applied in the instant case, said that it would order Petitioner to refrain from "making unilateral changes in [employees'] terms and conditions of employment *without consulting* their bargaining agent" (J.A. 25; emphasis supplied).

If the Board is correct in its position that an employer must bargain about every business decision having an impact upon wages, hours or other terms or conditions of employment, and if the Court below is correct in its position that bargaining must reach an impasse before unilateral action may be taken, the pace at which an employer does business, or goes out of business, will be limited to the pace set in bargaining by the union or unions with which he deals. Furthermore, any unilateral action which he takes will be taken at the risk that his own concept of an impasse may differ in the particular case from that of the Board.

III. The Order That Petitioner Resume Its Maintenance Operations and Reinstate the Individuals Formerly Employed Therein Is Both Novel and Mischievous; It disregards Applicable Decisions of This Court and Violates an Explicit Provision of the Act.

This is the first instance in the history of the Act in which the Board has ordered reinstatement in a case involving only a refusal to bargain.[5] It also is the first instance in

5. In the past, the remedy for a refusal to bargain has been simply an order requiring bargaining. Thus, where an employer moving his plant violated his duty to bargain regarding placement of affected employees (tenure of employment), the employer was

which the Board has ordered the resumption of operations which, for any reason, good or bad, have been discontinued.[6]

While its novelty does not of itself condemn the remedy, the fact that it took the Board twenty-seven years to discover it invites a scrutiny which the Court below failed to give it.[7]

As for the importance of the question whether this kind of an order is proper in a case such as the present, the decision means that no matter what discussions the employer may have had with the union or unions affected, no business decision can be effectuated except at the risk that some years later[8] what has been done will be ordered undone

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ordered only to bargain regarding such placement (see, e.g., *Brown Truck & Trailer Mfg., Inc., supra* p. 10) and sometimes even this remedy was denied (see, e.g., *Bickford Shoes, Inc., supra* p. 10). Even after its dictum (quoted in the text, *infra* p. 22) in *Town & Country Manufacturing Co.*, the Board, in *Renton News Record, supra* p. 12, declined to require the employer to resume its discontinued type-setting operations and reinstate the individuals who had been employed therein for the reason that such an order would be "punitive" (136 NLRB at p. 1298). See also *Lori-Ann of Miami, supra* p. 12, where the employer was ordered only to bargain.

6. Even where the discontinuance of operations was itself "discriminatory" and violative of Section 8(a)(3) of the Act, it was the Board's practice, not to order resumption of the operations, but to order only that the terminated employees be placed upon a preferred list for reemployment in the event of a voluntary resumption of the operations. See, e.g., *New Madrid Manufacturing Co.*, 104 NLRB 117 (1953), enf. granted in part and den. in part, 215 F.2d 908 (8th Cir. 1954); *Barber's Iron Foundry*, 126 NLRB 30 (1960); *M. Yoseph Bag*, 128 NLRB 211 (1960), 139 NLRB No. 108 (1962). In *Darlington Manufacturing Co.*, 139 NLRB No. 23 (1962), which was decided after *Town and Country Manufacturing Co.* and in which a plant had been closed in violation of Section 8(a)(3), the Board did not order that the plant be reopened, but ordered only that the employees who had been terminated be placed upon preferred lists for employment at other plants.

7. The Court, while considering the Union's objections to the order, made no mention of the fact that Petitioner had objected thereto.

8. Cases decided by the Board in 1958 involved an average elapsed time of nearly one and one-third years (465 days) between issuance of the complaint and rendition of the Board's decision and

because of failure of the discussions to conform in some respect to the Board's notion of good faith bargaining or because of the choice made by the Board between conflicting versions of what was said.

Applicable Decisions of this Court.

In justification of its order, the Panel, quoting with approval from its *Town and Country* opinion, said:

> "*Since the loss of employment stemmed directly from their employer's unlawful action in by-passing their bargaining agent*, we believe that a meaningful bargaining order can be fashioned only by directing the employer to restore his employees to the position which they held prior to this unlawful action" (J.A. 25; emphasis supplied).

The order thus was based, in part at least, upon an assumption that the loss of jobs resulted from Petitioner's supposed refusal to bargain—i.e., that bargaining would have resulted in abandonment by Petitioner of its plan to contract out the work.

There was no more warrant for the foregoing assumption than there was for a similar assumption which caused this Court to overturn a Board order in the completely analogous case of *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).[9] The order is punitive rather than remedial

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almost two and one-half years between issuance of the complaint and a court decree enforcing or setting aside the Board order. *Report of Advisory Panel on Labor-Management Relations Law to the Senate Committee on Labor and Public Welfare*, Sen. Doc. No. 81, 86th Cong., 2nd Sess., p. 10 (1960). In the present case, the elapsed time between issuance of the complaint and rendition of the Supplemental Decision was approximately three years. It has now been more than four years since the complaint was issued.

9. An order that the employer cease giving effect to certain contracts with the International Brotherhood of Electrical Workers was vacated by this Court because based upon the "unwarranted assumption" that "the contracts were the fruit of the unfair labor practices". (305 U.S. at 238).

and for this reason, if for no other, exceeded the Board's powers. *Consolidated Edison Co. v. NLRB, supra; Republic Steel Corporation v. NLRB*, 311 U.S. 7 (1940). The Board itself recognized the punitive character of such an order in *Renton News Record, supra*, page 12.

Speculation that bargaining would have had one outcome rather than another is, we submit, not a proper basis for a Board order.

Conflict with Section 10(c) of the Act.

Furthermore, the order violates the Act's express prohibition of compulsory reinstatement of employees terminated for cause (see Sec. 10(c), 29 U.S.C. Sec. 160(c)). As shown by the legislative history (93 Cong. Rec. 6518 (1947)), that provision was designed to limit the Board's power of reinstatement to cases involving discharges for "union activity" —that is, discharges violative of Sections 8(a)(1) and 8(a)(3) of the Act; the word "cause" was not used as a mere synonym for "misconduct," but was intended to embrace any legitimate reason, including a reduction in force motivated by legitimate business considerations. See *Shamrock Dairy, Inc.*, 280 F.2d 665, 666 (D.C. Cir. 1960), cert. den., 364 U.S. 892.

IV. The Points Which the Court Below Failed to Consider Present Questions of Importance in the Administration of the Act; One Raises a Question Upon Which the Decision Below Conflicts with Applicable Decisions of This Court, and Another Raises Questions Which Have Not Been, but Should Be, Settled by This Court; in Their Inattention to These Questions, the Board and the Court Below Have So Departed from the Accepted and Usual Course of Administrative and Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

Although failing to mention them in its opinion, the Court below, in decreeing enforcement of the Board's order,

necessarily decided adversely to Petitioner, not only the questions raised by its objections to the order of reinstatement, but also two other questions which Petitioner had raised. Both are related to "those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature" (*Morgan v. United States*, 304 U.S. 1, 19 (1937), rehear. den., 304 U.S. 23). Both are important in the administration of the Act.

The Board's Denial of Petitioner's Request to Reopen the Record.

In justification of its order that Petitioner resume performance of the maintenance operations, the Panel said:

> "We do not believe that requirement imposes an undue or unfair burden on Respondent. The record shows that the maintenance operation is *still* being performed in much the same manner as it was prior to the subcontracting arrangement." (J.A. 25, n. 19; emphasis supplied.)

How the record could possibly show this in view of the fact that it had been three years since the evidence was closed, the Panel did not explain. And almost in the same breath with the statement above quoted, it denied Petitioner's request that the record be reopened for evidence that the operation was *not* still the same—that Petitioner had permanently discontinued certain of its manufacturing operations and had moved others to a new plant in another city, with substantial effect upon the nature and extent of the maintenance work at Emeryville.

The reason given for denying the request was that "the issues raised therein are basically matters which are more properly treated at the compliance stage of the proceedings" (J.A. 19).

But the evidence dealt with a question which the Panel did *not* postpone to the compliance stage of the proceedings

but treated in its decision—namely, the question whether an "undue or unfair burden" would be imposed upon Petitioner by an order that it turn back the clock three years.

Furthermore, the Panel's failure to phrase its order in the light of that evidence places Petitioner in a quandary as to what is required of it. Arguably, the requirement that Petitioner resume its maintenance operations as formerly conducted by it at Emeryville embodies a requirement that it resume, at Emeryville, manufacturing operations which have been permanently discontinued or moved to a new plant in another city. And if the order does not require this, then, arguably, it requires that employment be offered at the new plant. In leaving to compliance proceedings the question whether Petitioner is required to resume operations which have been discontinued or moved elsewhere, or to offer employment at the new location, the order places Petitioner in peril of being adjudged in contempt for wrong answers to those questions. This Court has repeatedly held that a Board order should not leave for determination in compliance proceedings questions such as these. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *J. I. Case Company v. NLRB*, 321 U.S. 332 (1944); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953).

The Board's Failure to Act with Reasonable Dispatch.

Section 6(a) of the Administrative Procedure Act required that the Board "proceed with reasonable dispatch" (5 U.S.C., Sec. 1005(a)). The only apparent reason for the delay of a year and one-half in acting upon the motions for reconsideration was that the Board as reconstituted was equally divided.[10] This was not a good reason for delay,

10. New member Brown was disqualified because he, as a regional director, had issued the complaint (see 5 U.S.C. sec. 104(c)).

but a bad one. The universal practice of reviewing courts and of administrative agencies when the membership of the court or agency is equally divided upon the matter before it, is to deny relief from the order or decision under attack. 5B C.J.S. Appeal-Error, Sec. 1844(b). This has been the procedure heretofore followed by the Board itself. See, e.g., *Shamrock Dairy, Inc.*, 124 NLRB 494, 501-502 (1959), aff'd 280 F.2d 665 (D.C. Cir. 1960), cert. den. 364 U.S. 892. The fact that the Board was equally divided, therefore, should have meant reasonably prompt denial of the motions. If the Board preferred to break the deadlock by referring the matter to a panel of three, this likewise should have been done promptly.

Because of the delay, if for no other reason, enforcement of the order should have been denied. The Act's purpose of assuring "that no agency shall . . . proceed in dilatory fashion to the injury of the persons concerned" (Senate Document No. 248, 79 Cong., 2d Sess., 1946, p. 264) would be defeated if the only remedy for unreasonable delay were a proceeding to compel action after the delay has occurred.

Members Rogers and Leedom had joined in the original decision and later dissented in *Town and Country Manufacturing Co.* Member Fanning had dissented from the original decision and was joined by the new Chairman, McCulloch, in the *Town and Country Manufacturing Co.* decision.

CONCLUSION

We respectfully submit that this petition for certiorari should be granted.

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(Appendices Follow)

Appendix A

United States Court of Appeals
for the District of Columbia Circuit

No. 17275

EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*
FIBREBOARD PAPER PRODUCTS CORPORATION, *Intervenor*

No. 17468

FIBREBOARD PAPER PRODUCTS CORPORATION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*
EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Intervenors.

On Petitions to Review and Cross-Petition for Enforcement of a Decision and Order of the National Labor Relations Board

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Decided July 3, 1963

Mr. Jerry D. Anker, with whom *Messrs. David E. Feller, Elliot Bredhoff*, and *Michael H. Gottesman* were on the brief, for petitioners in No. 17275 and intervenors in No. 17468.

Mr. Marion B. Plant, with whom *Mr. Gerard D. Reilly* was on the brief, for petitioner in No. 17468 and intervenor in No. 17275.

Mr. Melvin J. Welles, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Stuart Rothman*, General Counsel at the time of argument, *Dominick L. Manoli*, Associate General Counsel, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent. *Mr. Herman Levy*, Attorney, National Labor Relations Board, also entered an appearance for respondent.

Before DANAHER, BASTIAN and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge*: These are consolidated petitions for review of an order of the National Labor Relations Board. Cross motions for intervention have been granted. In response, the Board seeks enforcement of its order.

Fibreboard Paper Products Corporation, petitioner in No. 17468, is engaged in the manufacture, sale and distribution of paint, industrial insulation, floor covering and related products, operating twenty plants in five states. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO, petitioner in No. 17275, until the events described below, had been the exclusive bargaining agent of the unit of maintenance employees at Fibreboard's Emeryville, California, plant.[1] The Union and the Company had had a history of collective bargaining

1. The employees in the unit included maintenance mechanics, electricians and helpers, working foremen, firemen and engineers employed in the powerhouse, and the storekeeper in the central supply and storeroom.

dating from 1937. At the time of the events relevant to this case, the parties had a one year collective bargaining agreement terminating July 31, 1959. The contract provided for automatic renewal for another year unless one of the contracting parties gave sixty days notice of a desire to modify or terminate the contract. On May 26, 1959, the Union gave such a notice and sought to arrange a bargaining session with Company representatives. The Company was not cooperative in arranging a meeting and the representatives of the Company and the Union did not meet until July 27.

During the period when the Union was seeking to negotiate a new contract, the Company was considering contracting out its maintenance work to an independent contractor. By July 27, four days before the end of the contract term and approximately two months after the Union's notice, the Company had decided to contract out all its maintenance work then being performed by 73 men. A meeting with representatives of the Union was arranged the afternoon of that day. At this meeting the Union agents were handed copies of a letter from the Company which stated in pertinent part:

> For some time we have been seriously considering the question of letting out our Emeryville maintenance work to an independent contractor, and have now reached a definite decision to do so effective August 1, 1959.
>
> In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless. However, if you have any questions, we will be glad to discuss them with you.

No negotiations were attempted during the remainder of that meeting. On July 30 another meeting was held at the Union's request for the purpose of bargaining about a new contract. At that time the Company representatives restated their position that they were not prepared to negotiate with

the Union on the question. On July 31, the employment of the 73 maintenance workers, including 50 represented by the Union, was terminated and employees of the subcontractor went on the job.

The Union filed charges against the Company and the Board's Regional Director issued a complaint alleging violations of Section 8(a)(1), 8(a)(3) and 8(a)(5) of the Labor Act. 29 U.S.C. §§ 158(a)(1), 158(a)(3), 158(a)(5). Hearings were held and the Trial Examiner filed his Intermediate Report recommending dismissal of the complaint. The Board accepted the Examiner's recommendation and dismissed the complaint. 130 NLRB 1558. The General Counsel and the charging Union filed petitions for reconsideration which were granted. On reconsideration, the Board modified its original decision to the extent of finding that the Company had violated Section 8(a)(5) "by unilaterally subcontracting its maintenance without bargaining with the . . . [Union] over its decision to do so." The Board issued an appropriate cease and desist order in light of its findings and in addition, affirmatively ordered the Company to restore its maintenance operations and offer reinstatement with back pay to the displaced employees. The Board ordered that back pay be calculated from the date of the Board's supplemental decision and order to the date of the Company's offer of reinstatement to the employees in question. The Supplemental Decision and Order did not modify the original decision with respect to the dismissal of the charges under 8(a)(1) and 8(a)(3). 138 NLRB No. 67.

In its petition for review, the Company argues that (a) it had no duty to bargain about its decision to contract out the maintenance work performed by a unit of approximately 73 employees; and (b) there was no appropriate finding that it refused to bargain about its decision to contract out and that any such finding would not be supported by substantial

evidence on this record. The Union challenges (a) the Board's failure to find a violation of Section 8(a)(3) and (b) the Boards failure to make the remedial order of back pay operative to the date of termination of employment.

(1)

The record clearly shows that the Company met with the Union to announce that it had decided to contract out the maintenance work, and that it would not bargain on this decision. This position was consistent with the Company's belief that contracting out was exclusively a "management prerogative" about which it could take unilateral action without first bargaining to impasse with the Union. The Board's opinions indicate that a finding of refusal to bargain was made by the Board. There is substantial evidence to support the Board's conclusion that the Company refused to bargain.

(2)

The facts of this case present the situation where the implementation of a decision to contract out the maintenance work, prompted by economic motives, extinguished the entire collective bargaining unit by terminating the employment of all of the members in that unit. In its supplemental decision and order the Board held that Fibreboard was under a duty to bargain with the Union on the proposed subcontracting before it took unilateral action.

It is important to point out certain issues which are not raised by this appeal, in order to define the limits of the issue we are deciding. We are not asked to evaluate a proposal made by management during the course of bargaining to determine whether it relates to a mandatory subject of bargaining within the intendment of Section 8d of the Act, *National Labor Relations Board v. Borg-Warner*, 356 U.S. 342 (1958), nor are we asked to evaluate unilateral action

concerning conditions of employment taken during negotiations, *National Labor Relations Board v. Katz*, 369 U.S. 736 (1962); we are not asked to evaluate the propriety of unilateral action taken after negotiations have reached an impasse, *National Labor Relations Board v. Intercoastal Terminal Inc.*, 286 F.2d 954 (5th Cir. 1961), nor are we asked to resolve issues relating to the scope of an arbitration clause in a collective bargaining agreement, *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

Here the Company did not acknowledge that collective bargaining was essential as a preliminary to terminating the employment of an entire bargaining unit, nor did the employer bargain to impasse before taking unilateral action of contracting out all of the plant's maintenance work. Thus we are faced with the employer's contention that he was under no legal duty to bargain with the Union prior to contracting out the maintenance work. If the employer had the right unilaterally to terminate the employment of all employees making up a bargaining unit by contracting out the work, there would, of course, be no point in bargaining for a renewal of the existing contract. The work performed by its former employees would be performed by employees of a subcontractor.

The purpose of imposing legal duties upon employers to meet and bargain with the representatives of employees is to create a structure of industrial self-government for a particular plant arrived at by consensual agreement between management and employees within the framework of the statute. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580-81 (1960). By guaranteeing employee participation in decisions relating to wages, hours, terms and conditions of employment, Congress made a determi-

nation that this would create an environment conducive to industrial harmony and eliminate costly industrial strife which interrupts commerce.

In framing Section 8(d) of the Act, 29 U.S.C. § 158(d), Congress was incorporating the decisions of the Board and the Courts defining the duty to bargain collectively. The statutory definition of those subjects about which the parties were required to bargain was of necessity framed in the broadest terms possible: wages, hours, terms and conditions of employment. The use of this language was a reflection of the congressional awareness that the act covered a wide variety of industrial and commercial activity and a recognition that collective bargaining must be kept flexible without precise delineation of what subjects were covered so that the Act could be administered to meet changing conditions. Congress left it to the Board, in the first instance, to give content to the statutory language, subject to review by the courts. *Richfield Oil Corp. v. National Labor Relations Board*, 97 U.S.App.D.C. 383, 231 F.2d 717, *cert. denied*, 351 U.S. 909 (1956).

The employer's contention in essence is that its unilateral action was justified because it was motivated solely by economic necessity and that the Board's rejection of the Union's Section 8(a)(3) claims shows the absence of any anti-union animus. But the Board's final conclusions do not rest on a basis of improper motivation. It is not necessary to find an anti-union animus as a predicate for a conclusion that the employer violated Section 8(a)(5) which commands good faith bargaining on wages, hours and terms and conditions of employment. It is enough that management's reasons for its proposal might have been deemed satisfactory by and have been acceptable to the Union. It is not necessary that it be likely or probable that the union will

yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly. By way of illustration: the union, after hearing management's side of the problem, might concede the justice of the claims and agree to invoke union discipline to increase productivity and reduce costs. Specifically it might proffer a six months trial period in which either productivity would be increased with the existing force of 73 men or maintained with a reduced force to effect the economies desired by management.[2] It has been so often pointed out that no citation is called for that the obligation to bargain is not an obligation to agree. The basic concepts underlying the Labor Management Relations Act call for utilization of joint efforts at the bargaining table as a substitute for labor strife.

Having in mind the broad powers conferred on the Board by Congress and our limited scope of review, we conclude on this record that the Board was warranted in its determination that the employer violated Section 8(a)(5) by refusing to bargain before terminating the employment of all the members of its maintenance force.

(3)

The General Counsel's case in support of the Section 8(a)(3) charge rested on proof of overt acts from which it sought to persuade the Board to draw inferences of anti-union animus. The evaluation of such evidence is a process peculiarly within the seasoned experience of the Board and we see no basis for disturbing its finding that no Section 8(a)(3) violation was proven.

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2. Paradoxically the employer concedes that it would have been interested in possible solutions which the union might have offered but its course of action foreclosed negotiation at the threshold.

(4)

Finally the Union challenges the Board's action in dating the back pay remedy only from the date of the Board's Supplemental Decision and Order. The Union relies on *A.P.W. Products, Inc.*, 137 NLRB No. 7, enforced, ... F. 2d ..... (2d Cir. 1963). We think it sufficient to point out that in that case it was the Board which chose to modify its longstanding practice with regard to tolling of back pay between the Intermediate Report favorable to an employer and a subsequent reversal by the Board, and the Court of Appeals enforced the order. In the present case the Board has framed what it deems to be an appropriate remedy and we see no basis to depart from the general rule of allowing the Board wide latitude in shaping remedies. See *National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *Phelps-Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177 (1941); *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U.S. 533 (1943).

The Board's order will be enforced.

(Title of Court and Cause Omitted)

On Petitions to Review and a Cross-Petition for Enforcement of an Order of the National Labor Relations Board

[Endorsed] United States Court of Appeals for the District of Columbia Circuit

Filed Jul 3 - 1963

Nathan J. Paulson, Clerk

Before: Danaher, Bastian and Burger, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record from the National Labor Relations Board, and on petitions to review and a cross-petition for enforcement of, the order of the National Labor Relations Board, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in these cases will be enforced.

Pursuant to Rule 38(b) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

Per Curiam.

Dated: Jul 3 - 1963

(Title of Court and Cause Omitted)

[Endorsed] United States Court of Appeals for the District of Columbia Circuit

Filed Oct 10 1963

Nathan J. Paulson, Clerk

DECREE

Before: Danaher, Bastian and Burger, Circuit Judges.

This cause came on to be heard upon petitions of East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO and United Steelworkers of America, AFL-CIO, (No. 17275) and Fibreboard Paper Products Corporation, (No. 17468) to review and modify an order of the National Labor Relations Board dated September 13, 1962, directed against Fibreboard Paper Products Corporation, Emeryville, California, its officers, agents, successors and assigns, and upon the Board answers and petition to enforce said order. The Court heard argument of respective counsel on April 29, 1963 and has considered the briefs and the transcript of record filed in this cause. On July 3, 1963, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's said order. In conformity therewith,

It Is Hereby Ordered, Adjudged and Decreed, by the United States Court of Appeals for the District of Columbia Circuit, that the said order of the National Labor Relations Board in said proceeding be, and it hereby is, enforced, and that Fibreboard Paper Products Corporation, its offi-

cers, agents, successors and assigns, abide by and perform the directions of the Board in said order contained.

/s/ JOHN A. DANAHER
Judge, United States Court of Appeals
for the District of Columbia Circuit

/s/ WARREN E. BURGER
Judge, United States Court of Appeals
for the District of Columbia Circuit

/s/ WALTER A. BASTIAN
Judge, United States Court of Appeals
for the District of Columbia Circuit

Appendix B

STATUTES INVOLVED

National Labor Relations Act

"Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible

to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

* * * * * * *

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ."

* * * * * * *

"Sec. 10.

* * * * * * *

"(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . .

"(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

Administrative Procedure Act

"Sec. 5.

* * * * * * *

"(c) The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for

any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

* * * * * * *

"Sec. 6. Except as otherwise provided in this Act—

"(a) Appearance.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to

appear for or represent others before any agency or in any agency proceeding."

* * * * * * *

"Sec. 8.

* * * * * * *

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

* * * * * * *

"Sec. 10.

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"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold

unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of section 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."